

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE MIDEAST AWARENESS
CAMPAIGN, a Washington non-profit
corporation,

Plaintiff,

v.

KING COUNTY, a municipal corporation,

Defendant.

NO. 11-cv-00094

MOTION FOR PRELIMINARY
INJUNCTION OF PLAINTIFF SEATTLE
MIDEAST AWARENESS CAMPAIGN

**NOTED FOR HEARING:
FEBRUARY 4, 2011**

RELIEF REQUESTED

Plaintiff Seattle Mideast Awareness Campaign (“SeaMAC”) respectfully requests that this Court issue a preliminary injunction, pursuant to Fed. R. Civ. P. 65, and direct Defendant King County to publish SeaMAC’s ad, which is protected by the First Amendment, within 24 hours of the date of this Court’s Order on this Motion.

This immediate, injunctive relief is appropriate because (1) SeaMAC is likely to succeed on the merits of its claims, (2) it will likely suffer irreparable harm in the absence of this injunctive relief, (3) the balance of equities tips in its favor, and (4) issuance of injunctive relief is in the public interest.

STATEMENT OF FACTS

Introduction

This is an action for injunctive and declaratory relief, filed by SeaMAC, as a consequence of Defendant King County's violation of SeaMAC's constitutional right of free speech.

On December 23, 2010, in violation of SeaMAC's constitutional right of free speech and contrary to its own Advertising Policy and Contract for Advertising, Defendant King County unilaterally, and unlawfully, decided to not publish an ad submitted by SeaMAC for publication on Defendant King County's buses.

Defendant King County Approved SeaMAC's Ad for Publication on Its Buses

In October 2010, SeaMAC contacted Defendant King County's agent, Titan Outdoor LLC, or titan360.com ("Titan"), for the purpose of placing an ad on the outside of selected buses. The ad contained pictures of children looking at a demolished building and contained the caption "Israel War Crimes – Your tax dollars at work."¹ The ad was intended to mark the two year anniversary of the Israeli bombing campaign, in Gaza, which occurred in December 2008 and January 2009.

Although not necessary, it is worth noting that the SeaMAC ad is evidence-based, as it is based on conclusions which have been reached by other, independent agencies and fact finding missions. For example, "War Crime" is a legal term, meaning a grave violation of the Geneva Conventions (*see e.g.*, 18 U.S.C. § 2441), and characterization of Israeli military conduct against Palestinians "war crimes" has been widely documented for years. The Report of the United Nations Fact Finding Mission on the Gaza Conflict, following its extensive investigation, concluded Israeli military forces committed war crimes and breaches of humanitarian law. Amnesty International found evidence of Israeli soldiers using Palestinian

¹ The evidentiary basis for much of the factual information set forth in this Motion is the Declaration Ed Mast (Mast Decl.), which accompanies this Motion. A copy of the proposed ad is attached to the Mast Decl. and marked as Exhibit A.

1 civilians, including children, as human shields— a war crime in violation of the Geneva
2 Convention.

3 SeaMAC gave Titan and Defendant King County a copy of the ad it intended to
4 publish on the buses on October 15, 2010. The ad was to run from December 27, 2010,
5 through January 19, 2011, inclusive. After it submitted its ad, Defendant King County
6 presented SeaMAC with its Contract for Advertising.

7 On November 10, 2010, SeaMAC was advised by Titan, on behalf of Defendant King
8 County, that, having reviewed the ad, it had been approved, as submitted, for publication on
9 the buses.

10 On December 13, 2010, SeaMAC executed Defendant King County's Contract for
11 Advertising.² Thereafter, SeaMAC paid the fee charged by Defendant King County. In all
12 other respects, SeaMAC fully performed its obligations as required by Defendant King
13 County in its Contract for Advertising.³

14 SeaMAC's ad was scheduled to begin running on Defendant King County's buses on
15 December 27, 2010, for 30 days, on 12 different buses. The timing of the publication of the
16 ad was important to SeaMAC, as it was intended to coincide with the Israeli bombing, in
17 Gaza, during December 2008 and January 2009.

18 In a complete about face, Defendant King County decided, on December 23, 2010,
19 that it would not honor its Contract for Advertising or its existing Advertising Policy and not
20 run the ad, as previously approved and agreed. Instead, Defendant King County issued a
21 press release, announcing this change of plans. In addition, Defendant King County
22 announced that its existing Advertising Policy was no longer in effect and that, effective
23 immediately, it was implementing a new, different, and interim Advertising Policy. Later that
24

25 ² A copy of the executed Contract for Advertising is attached to the Mast Decl. and marked as
26 Exhibit B.

³ SeaMAC paid MVP Poster, Inc., the printer for the ad to be placed on the buses, on
December 14, 2010.

1 same day, a representative from Titan contacted SeaMAC and formally notified it that the ad
2 had been cancelled.

3 ***King County's Policy and Practices Authorize Publication of SeaMAC's Ad***

4 At least as early as October 2010, Defendant King County had in place a written
5 policy concerning its policies, practices, and procedures for the placement and payment of ads
6 on its public transit buses (the "Advertising Policy"), and this policy was applicable to
7 SeaMAC's ad.⁴

8 Defendant King County's Advertising Policy required only that an ad not be
9 objectionable under contemporary community standards—or insulting, degrading or offensive
10 to a degree that it will incite lawless action breaching public safety, peace, and order. Under
11 this same policy, Defendant King County had run advertisements on its buses by political,
12 religious, and other groups, including "Save Gaza" ads in 2009.⁵

13 It is clear that, consistent with, and pursuant to, its Advertising Policy, Defendant King
14 County has a long and established practice of publishing a wide variety and spectrum of ads
15 containing non-commercial speech—including, but not limited to, information related to the
16 conflict in Gaza between Israelis and Palestinians. Publication of these ads on its buses was
17 also authorized by and consistent with Defendant King County's Advertising Policy. Under
18 its Advertising Policy, Defendant King County had run advertisements by political, religious,
19 and other groups.

20 It is also worth noting that these ads, with similar content and similar language, have
21 been published in King County, without incident. For example, the use of the phrase "Stop
22 Funding Israel's War Crimes" has been prevalent in Seattle for several years.⁶ Perhaps even
23

24 ⁴ Defendant King County administered or implemented this Advertising Policy, in part,
25 through Titan, its agent.

26 ⁵ Copies of the "Save Gaza" ad are attached to the Mast Decl. and marked collectively as
Exhibit C.

⁶ Copies of photographs from public demonstrations in Seattle in 2008 and 2009 are attached
to the Mast Decl. and marked collectively as Exhibit D.

1 more importantly, the phrase “Stop Israeli War Crimes”, a phrase quoted in SeaMAC’s ad,
 2 has been published at public demonstrations in King County as recently as January 8, 2011
 3 (after King County decided not to publish our ad), without incident.⁷

4 By virtue of this long established practice and implementation of its Advertising
 5 Policy, Defendant King County’s buses were a designated public forum.

6 At the same time Defendant King County disclosed its change of course and refusal to
 7 publish SeaMAC’s ad, it also announced its intent to implement an “Interim Transit
 8 Advertising Policy” and indicated that this new policy was meant to “advance the primary
 9 purpose” of the transit advertising program—to generate revenue to benefit the transit
 10 system.⁸ Among its prohibitions, this new, interim policy prohibits “[a]ny advertising from
 11 non-governmental entities if the subject matter and intent of said advertising is non-
 12 commercial.” *Interim Metro Transit Advertising Policy*, Dec. 23, 2010, at 4. It appears that
 13 the effect of this policy allows Defendant King County to refuse all non-commercial
 14 advertisements.

15 It is worth observing that this new, interim policy does not apply to SeaMAC’s ad.
 16 This new, interim policy—which was announced at the same time Defendant King County
 17 decided to change course and cancel SeaMAC’s ad—confirms, however, that SeaMAC’s ad
 18 was authorized by and complied with the Advertising Policy in place at the time its ad was
 19 submitted and approved.

21 ⁷ Copies of photographs where the phrase “Stop Israeli War Crimes” has been used at public
 22 demonstrations in King County as recently as January 8, 2011 (after King County decided to not
 23 publish the SeaMAC ad), are attached to the Mast Decl. and marked collectively as Exhibit E.

24 ⁸ Included in its litany of assertions that this interim policy would advance this “primary
 25 purpose”, Defendant King County claimed that this interim policy would support transit revenues,
 26 prevent the appearance of favoritism by the County, prevent the risk of imposing views on a captive
 audience, maintain a position of neutrality on controversial issues, preserve the marketing potential of
 the advertisement spaces, maximize ridership, prevent harm or abuse that may result from running
 offensive advertisements; reduce the diversion of resources from transit operations that is caused by
 controversial advertisements; and advance police power and public health interests to avoid content
 that may be harmful to minors and other members of the public. *Interim Metro Transit Advertising
 Policy*, Dec. 23, 2010, at 1-2.

ISSUE PRESENTED

Whether this Court should issue an order directing Defendant King County to immediately publish SeaMAC's ad, given that (1) SeaMAC is likely to succeed on the merits of its claims, (2) SeaMAC will likely suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) issuance of the injunction is in the public interest.

EVIDENCE RELIED UPON

Declaration of Jeffrey Grant (together with the attached Exhibits A, B, and C)

Declaration of Ed Mast (together with the attached Exhibits A-E)

AUTHORITY

Preliminary Injunctive Relief Should Be Granted

"In order to obtain injunctive relief, the party seeking the injunction must demonstrate that 'he is *likely* to succeed on the merits [and] that he is *likely* to suffer irreparable harm in the absence of preliminary relief.'" *Hagens Berman Sobol Shapiro LLP v. Rubinstein*, 2009 U. S. Dist. LEXIS 69632, at 3 (W.D. WA, at Seattle) (quoting *Winter v. NRDC, Inc.*, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008)).

In addition, a "plaintiff seeking a preliminary injunction must also show 'that the balance of equities tips in his favor, and that the injunction is in the public interest.'" *Hagens Berman Sobol Shapiro LLP v. Rubinstein*, 2009 U. S. Dist. LEXIS 69632, at 3-4 (W.D. WA, at Seattle) (quoting *Winter v. NRDC, Inc.*, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008)).

As demonstrated more fully below, these criteria are clearly satisfied in this action.⁹

SeaMAC's Ad Is Constitutionally Protected Free Speech

In order to determine whether Defendant King County has violated SeaMAC's First Amendment Right by refusing to run its ad, this Court must address three primary issues.

⁹ This Court has the discretion to waive the need for Plaintiff SeaMAC to give security in this case, as it is unlikely that Defendant King County will sustain costs or damages if it is later determined that this Defendant King County was "wrongfully enjoined or restrained". Fed. R. Civ. P. 65(c).

1 *First*, Defendant King County’s bus advertising panels must be classified under the Supreme
 2 Court’s “forum approach” for assessing the validity of restrictions on the use of government
 3 property, *see Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).
 4 *Second*, the relevant level of judicial scrutiny for such a forum must be determined, based on
 5 the type or classification of public forum. *Third*, it must be determined whether Defendant
 6 King County properly applied the relevant standard in rejecting SeaMAC’s ad.

7 In this case, the proper classification for the forum in question—public transportation
 8 buses—is that of a designated public forum, and the level of judicial analysis is that of strict
 9 scrutiny (the restriction of speech must be narrowly drawn to achieve a compelling
 10 governmental interest in order to pass constitutional muster). It is clear that Defendant King
 11 County’s restriction of SeaMAC’s right of free speech was done improperly.

12 ***King County’s Bus Advertising Panels Constitute a Designated Public Forum***

13 The Supreme Court “has adopted a forum analysis as a means of determining when
 14 the Government’s interest in limiting the use of its property to its intended purpose outweighs
 15 the interest of those wishing to use the property for other purposes.” *Cornelius v. NAACP*
 16 *Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). Forum analysis divides
 17 government property into three categories (1) *public forum*—a place that has traditionally
 18 been available for public expression (*e.g.*, public parks); (2) *designated public forum*—a non-
 19 traditional forum that the government has opened for expressive activity by part or all of the
 20 public; and (3) *non-public forum*—all remaining government property. *See id.* at 800, 802-
 21 03; *Perry v. Educ. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 46 & n.7 (1983).

22 In classifying the relevant forum, the Court has “focused on the access sought by the
 23 speaker.” *Cornelius*, 473 U.S. at 801. Here, the relevant forum at issue is the exterior
 24
 25
 26

1 advertising spaces, or panels, on Defendant King County's buses.¹⁰

2 Where there is a policy governing the display of advertisements by transit authorities,
3 the exterior panels of buses used for advertising, the debate centers on whether such panels
4 constitute a designated public forum or a non-public forum. *See e.g., Christ's Bride*
5 *Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 248 (3d Cir. 1998) (holding
6 that a transit authority's advertising space did not constitute a traditional public forum).

7 The creation of a designated public forum requires a decision by the government to
8 "intentionally open[] a nontraditional forum for public discourse." *See Cornelius*, 473 U.S. at
9 802-03; *Christ's Bride Ministries*, 148 F.3d at 248 ("A designated public forum is created
10 because the government so intends. Inaction does not make such a forum; neither does the
11 allowance of 'limited discourse.'" (quoting *Cornelius*, 473 U.S. at 802)). In determining if
12 the government created a designated public forum, courts have looked to the government's
13 intent with regard to the forum in question—whether the government clearly and deliberately
14 opened the forum to expressive conduct—considering the government's policy and practice,
15 the nature of the property, and the property's compatibility with expressive activity. *See*
16 *Cornelius*, 473 U.S. at 802-03; *Christ's Bride Ministries*, 148 F.3d at 248.¹¹

17 Various Circuit Courts have concluded that advertising space on government-run
18 buses becomes a designated public forum where the transit authority has permitted advertising
19 on a "wide variety of commercial, public-service, public-issue, and political ads," *Planned*
20 *Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1232 (7th Cir.

21 ¹⁰ *See Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998); *Christ's*
22 *Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 248 (3d Cir. 1998) ("[The
23 plaintiff] . . . sought access only to the advertising space leased out by [the transit authority] . . . We
conclude, therefore, that the forum at issue is [the transit authority's] advertising space.").

24 ¹¹ It may not be enough to simply demonstrate that the government has opened a property for
25 communication, *see Children of the Rosary*, 154 F.3d at 976-77 (characterizing exterior bus panels
26 used for advertising as a non-public forum and stating that, "*Lehman* undermines appellants' claim
that if a city has opened a property for communication, the property becomes a designated public
forum"); that is, the question becomes whether the government has "expressly" dedicated its
advertising space to "speech activity." *U.S. v. Kokinda*, 497 U.S. 720, 726-27 (1990). In this vein,
courts have considered the government's past practice in conjunction with the purpose of the forum.
See, e.g., Cornelius, 473 U.S. at 47-48.

1 1985), or where the transit authority has permitted “political and other non-commercial
 2 advertising generally” on the exterior of buses, *New York Mag. v. Metropolitan Transp. Auth.*,
 3 136 F.3d 123, 130 (2d Cir. 1998) (holding that, because the transit authority allowed both
 4 commercial and political speech, the outside of its buses constituted designated public
 5 forums). *See also Christ’s Bride Ministries*, 148 F.3d at 252 (“We conclude then, based on
 6 [the transit authority’s] written policies, which specifically provide for the exclusion of only a
 7 very narrow category of advertisements, based on [the transit authority’s] goals of generating
 8 revenues through the sale of ad space, and based on [the transit authority’s] practice of
 9 permitting virtually unlimited access to the forum [having allowed, among other
 10 advertisements, religious messages, an advertisement criticizing a political candidate,
 11 advertisements concerning AIDS education and abortion], that [the transit authority] created a
 12 designated public forum. Moreover, it created a forum that is suitable for the speech in
 13 question, *i.e.*, posters which presented messages concerning abortion and health issues . . . We
 14 need not define the precise boundaries of the forum . . . The topic of abortion and its health
 effects were . . . ‘encompassed within the purpose of the forum.’” (quoting *Cornelius*, 473
 U.S. at 806)).

15 Based on Defendant King County’s Advertising Policy which applies to SeaMAC’s
 16 ad, and its past practices, it is clear that that Defendant King County had allowed a “wide
 17 variety” of “political and other non-commercial” advertisements and, thus, transformed the
 18 exterior bus panels of its buses into designated public forums. Similar to the policies which
 19 have been held to create a designated public forum in other cases, Defendant King County’s
 20 Advertising Policy prohibited only a few categories of ads (*e.g.*, those concerning tobacco
 21 products) and allowed for great discretion on the part of Defendant King County to decide
 22 which advertisements were “objectionable” based on community standards. *Planned*
 23 *Parenthood*, 767 F.2d at 1232-33 (holding that the transit authority had created a designated
 24 public forum because it maintained no system of control over the advertisements that it
 25 accept[ed] . . . other than the general contractual directive . . . to refuse vulgar, immoral, or
 26 disreputable advertising” and “allowed its advertising space to be used for a wide variety of
 commercial, public-service, public-issue, and political ads”; noting also that the transit
 authority had no policy pursuant to which the advertisement at issue was excluded); *Christ’s*

1 *Bride Ministries*, 148 F.3d at 254 (noting that no policy or practice demonstrated that the
 2 government intended the forum to be closed to the speech at issue; finding that “the record
 3 points exactly the other way. In its efforts to generate advertising revenues, [the transit
 4 authority] permitted abortion-related and other controversial ads concerning sexuality”; and
 5 holding that the transit authority’s action did not survive strict scrutiny, such that the transit
 6 authority violated the First Amendment when it chose to remove the ads at issue).

7 The evidence establishes two important conclusions. *First*, Defendant King County
 8 has dedicated the exterior panels of its buses to “expression in the form of paid
 9 advertisement.” *Id.* at 250 (“The nature of the forum is partly commercial, consistent with the
 10 goal of [the transit authority] to earn a profit on its advertising space . . . However, [the transit
 11 authority] has also used the advertising space to generate a profit through *expressive* activity.
 12 This expressive use has not interfered with providing rail transportation facilities to the
 13 public. Thus, the nature of the forum suggests . . . that the government has dedicated the space
 14 to expression in the form of paid advertisements.” (emphasis in original)).

15 *Second*, Defendant King County opened the forum provided by its exterior bus panels
 16 to discourse about the very political issue depicted in SeaMAC’s ad by having run similar ads
 17 in 2009.

18 As a consequence, Defendant King County’s rejection of SeaMAC’s ad ran afoul of
 19 the First Amendment. *See, e.g., Christ’s Bride Ministries*, 148 F.3d at 253. (“[The transit
 20 authority] claims that the forum is closed to all speech, and that short of viewpoint
 21 discrimination, [the transit authority] can make any content-based restrictions it chooses.
 22 [The transit authority’s] prior acceptance of a broad range of advertisements cuts particularly
 23 strongly against this claim.”).

24 ***Defendant King County’s Decision to Limit SeaMAC’s Speech Is Subject To Strict Scrutiny***

25 When the government seeks to restrict speech by restricting access to its own property,
 26 the kind of scrutiny to which this restriction is subjected depends on how we categorize the
 property as a forum for speech. *Int’l Soc’y for Krishna Consciousness, Inc.*, 505 U.S. at 678-
 79.

In a designated public forum, the government’s content-based restrictions on private
 speech must survive strict scrutiny (*i.e.*, the restriction must be narrowly drawn to achieve a

1 compelling governmental interest) in order to pass constitutional muster. *Perry*, 460 U.S. at
2 45-46.

3 Defendant King County's buses exterior panels are a designated public forum, because
4 Defendant King County has a long and established practice and policy of displaying ads
5 similar to SeaMAC's. In this case, Defendant King County cannot demonstrate that its
6 censorship of SeaMAC's freedom of speech was narrowly drawn to achieve a compelling
7 governmental interest.

8 SeaMAC is, therefore, likely to prevail on its constitutional claim that Defendant King
9 County has violated its First Amendment rights.

SeaMAC Will Suffer Irreparable Injury if Defendant King County Censors Its Free Speech

10 The injury to SeaMAC caused by Defendant King County's unlawful censorship of
11 free speech is likely, *Winter v. NRDC, Inc.*, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008),
12 and imminent, *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 674-75 (9th
13 Cir. 1988).

14 Defendant King County's unilateral and improper decision to publish has prevented
15 SeaMAC from publishing its message—in an economical and effective manner. Moreover,
16 the timing of the ad was important to SeaMAC—during the two year anniversary of the Israeli
17 bombing campaign in Gaza during December 2008 through January 2009.

18 The injury to SeaMAC is, therefore, likely, imminent, and irreparable.

The Balance of Equities Are in Favor of SeaMAC

19 In this case, the benefits of promoting more speech, not less, and of refusing to limit
20 speech in response to fear, or aggressive email tactics, easily “tips the balance of equities” in
21 favor of SeaMAC.

An Injunction Is in the Public Interest

22 In this case, the public interest includes promoting a policy of free speech—a
23 constitutionally protected right.

24 Enforcement of constitutional rights is in the public interest—a conclusion so firmly
25 true as to need no citation to authority. Moreover, all citizens—governments included—must
26 be held accountable to their commercial promises.

1 **Summary**

2 Defendant King County's efforts to censor SeaMAC's right of free speech—in light of
3 Defendant King County's long and established practice of wide spectrum of ads published on
4 its buses, its Advertising Policy, and its Contract for Advertising—can no longer be
5 maintained.

6 Immediate, injunctive relief is appropriate because (1) SeaMAC is likely to succeed on
7 the merits of its claims, (2) it will likely suffer irreparable harm in the absence of this
8 injunctive relief, (3) the balance of equities tips in its favor, and (4) issuance of injunctive
9 relief is in the public interest.

10 **CONCLUSION**

11 It is respectfully requested that this Court grant Plaintiff SeaMAC's Motion for
12 Preliminary Injunction and direct Defendant King County to publish Plaintiff SeaMAC's ad
13 on its buses within 24 hours of this Court's Order.¹²

14 DATED this 19th day of January, 2011.

15 SKELLENGER BENDER, P.S.

16 By s/ Jeffrey C. Grant
Jeffrey C. Grant, WSBA #11046

17 Cooperating Attorneys for the
18 ACLU of Washington Foundation

19 ACLU OF WASHINGTON FOUNDATION
20 Sarah A. Dunne, WSBA # 34869
21 Lindsey Soffes, WSBA # 41506
22 901 5th Avenue, Suite 630
23 Seattle, WA 98164-2008
24 Telephone: (206) 624-2184

25 Attorneys for Plaintiff Seattle
26 Mideast Awareness Campaign

¹² The logistics of publication (*e.g.*, the number of buses, the number of days, and the like) should be governed by the parties' Contract for Advertising or further Order of this Court.

CERTIFICATE OF SERVICE

I certify that on January 19, 2011 I electronically filed the Motion for Preliminary Injunction of Plaintiff Seattle Mideast Awareness Campaign and this Certificate of Service with the Clerk of the Court using the CM/ECF system. In addition, I sent a copy to Jennifer Ritchie, King County Prosecuting Attorney, by email to:

jennifer.ritchie@kingcounty.gov

By s/ Jule Sprenger
Jule Sprenger
Legal Assistant
Skellenger Bender, P.S.
1301 Fifth Avenue, Suite 3401
Seattle, WA 98101
Tel: (206) 623-6501
Fax: (206) 447-1973
Email: jsprenger@skellengerbender.com